

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY HARMON	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN McCULLOUGH, et al.	:	No. 99-3199

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

June 22, 2000

Petitioner Henry Harmon ("Harmon" or "petitioner") filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254. By order of August 23, 1999, the court referred the petition to United States Magistrate Judge Peter B. Scuderi ("Judge Scuderi"). Judge Scuderi filed a Report and Recommendation for dismissal of the petition; Harmon filed written Objections to the Recommendation, and the Commonwealth filed a Response to Petitioner's Objections. After de novo review of the Report and Recommendation, the Report and Recommendation will be approved and the Objections will be overruled.

**BACKGROUND**

Harmon was convicted in the Court of Common Pleas of Philadelphia County of six counts of aggravated assault and one count of carrying a firearm in a public place.<sup>1</sup> Harmon was sentenced to a total term of 24 to 48 years of imprisonment. Harmon filed an appeal to the Pennsylvania Superior Court

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<sup>1</sup>The facts set forth in this procedural history are adopted from Judge Scuderi's Report and Recommendation.

claiming:

1. The trial court abused its discretion in finding that the prosecutor's peremptory challenges were not used in a racially discriminatory manner, violating Batson v. Kentucky, 476 U.S. 79 (1986);
2. The evidence was insufficient to support a conviction on all six counts of aggravated assault;
3. The verdict was against the weight of the evidence; and
4. The court abused its discretion by imposing a sentence beyond the sentencing guidelines.

On May 29, 1998, the Superior Court affirmed Harmon's conviction. Harmon subsequently filed a petition for allocatur with the Pennsylvania Supreme Court. While Harmon's petition for allocatur was pending, Harmon filed for collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 et seq. The PCRA petition was dismissed without prejudice because of the pending appeal. The Supreme Court of Pennsylvania denied allocatur on December 23, 1998; Harmon did not pursue any further PCRA relief.

Harmon filed a pro se petition for a writ of federal habeas corpus on June 24, 1999. On December 7, 1999, Harmon was granted leave to amend his petition by Judge Scuderi. The amended petition claimed:

1. The prosecutor used her peremptory challenges in a racially discriminatory manner;
2. The jury's verdict was against the weight of the evidence; and
3. There was insufficient evidence to sustain the six

counts of aggravated assault.

The Commonwealth responded that Harmon's claims were either non-cognizable or meritless.

## **DISCUSSION**

### **I. Exhaustion**

All claims that a petitioner presents to a federal court in an attempt to obtain a writ of habeas corpus must have been exhausted at the state level. 28 U.S.C. § 2254(b)(1)(A). Claims are exhausted when they have been fairly presented once at every level of the complete appeals process of the state court system. See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). The petitioner does not have to seek state collateral relief. See Castille v. Peoples, 489 U.S. 346, 350 (1989) (It is not necessary to seek collateral review to exhaust a claim when the state courts have ruled on the claim); Brown v. Allen, 344 U.S. 443, 447 (1953); see also O'Sullivan, 526 U.S. at 844 (citing Brown v. Allen). Harmon fairly presented his claims to each level of the Pennsylvania appeals process; Harmon's claims are exhausted.

### **II. Standard for Granting Habeas Corpus**

In order for a writ of habeas corpus to be granted, the state court decision must either be: 1) contrary to established U.S. Supreme Court precedent such that the precedent requires the contrary outcome or rest on an objectively unreasonable

application of U.S. Supreme Court precedent; or 2) an unreasonable determination of the facts based on the evidence in the state court. See 28 U.S.C. § 2254(d); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 887-91 (3d Cir. 1999).

### III. State Court Factual Findings

Harmon objected generally to the factual findings of Judge Scuderi.<sup>2</sup> In his amended petition, Harmon questioned the motives of the witnesses and the prosecution at his trial. Claims about witnesses' motivations are questions of credibility that are best decided at the trial. See United States v. Friedland, 660 F.2d 919, 931-32 (3d Cir. 1981). The trial court's finding of no discrimination in the prosecution's peremptory strikes raises similar questions of credibility. See Hernandez v. New York, 500 U.S. 352, 364 (1991). The factual findings of no discrimination and witness credibility are supported in the record. Factual findings by a state court are presumed to be correct, and the burden is on the petitioner to overcome this presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). Harmon has not met that burden; the state court factual findings are presumed correct.

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<sup>2</sup>Petitioner claimed:

1) The factual findings on the issues of evidentiary sufficiency and Batson of Judge Scuderi were not supported by the record; and

2) Judge Scuderi simply agreed with the state court findings without giving Harmon's factual claims due consideration.

#### IV. Racially Discriminatory Jury Challenges

Whether a prosecutor's challenges were used in a racially discriminatory manner is determined by a three-part process. See Batson v. Kentucky, 476 U.S. 79, 96-98 (1986). First the defendant must make out a prima facie case that the challenges were exercised on the basis of race. See id. at 96. Then the burden shifts to the prosecutor to provide race-neutral explanations for the challenges. See id. at 97. A challenge is race-neutral unless discriminatory intent is inherent in the proffered explanation. See Hernandez, 500 U.S. at 360. Finally, the judge makes a factual determination as to discrimination. See Batson, 476 U.S. at 98; See also Hernandez, 500 U.S. at 364 (The determination of discriminatory intent is a pure issue of fact).

After determining that Harmon made a prima facie case, the trial court found that the explanations offered by the prosecution were race-neutral and nondiscriminatory.<sup>3</sup> The stated

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<sup>3</sup>The prosecutor claimed the prospective jurors were struck because:

- 1) One juror had a brother with a criminal record whom she saw quite regularly;
- 2) One juror had a cold;
- 3) One Juror had a scientific background which might cause problems during deliberations on the scientific evidence produced at trial;
- 4) One juror demonstrated an inability to understand reasonable doubt; and
- 5) One juror had an aversion to the death penalty, which was an issue in the case.

reasons for peremptory challenges do not have to be sufficient to support a "for cause" challenge. Batson, 476 U.S. at 97. A peremptory challenge in a Batson inquiry does not even have to be persuasive; it just cannot violate equal protection. Purkett v. Elem, 514 U.S. 765, 769 (1995). The trial court complied with Batson.

The petitioner must rebut determinations of fact by clear and convincing evidence. The trial court's factual determinations that the prosecutor's challenges were not discriminatory were not rebutted by clear and convincing evidence.

The state court findings are not contrary to or an unreasonable application of U.S. Supreme Court precedent; nor are they based on an unreasonable determination of the facts.

In his Objections to the Magistrate Judge's Report, the petitioner stated that Jones v. Ryan, 987 F.2d 960 (3d Cir. 1993), presented a situation similar to his own. In Jones, the state court made no findings of fact, See id. at 965-6. The trial judge in Jones applied Swain v. Alabama, 380 U.S. 202 (1965), instead of Batson, when the defendant objected to the prosecutor's challenges. See id. at 969. The Swain test is more stringent than Batson and requires the defendant to show a repeated pattern of racially discriminatory strikes over a number of cases. See id. at 967. The prosecutor in Jones also used race

as an explicit factor in his challenges and gave only general policy reasons not specific to the particular case and juror. See id. at 973-4.

Harmon's situation is distinguishable. The trial court did make findings of fact; the trial judge applied Batson. The prosecutor at Harmon's trial stated reasons for the peremptory challenges that were not racially motivated on their face and were specific to the juror and the case. There was no constitutional error under Batson.

#### V. Against the Weight of the Evidence

Harmon's claim that the trial court decision was against the weight of the evidence is not a cognizable basis for habeas relief. See Tibbs v. Florida, 457 U.S. 31, 42-45 (1982); Alamo v. Frank, No. Civ. A. 97-3022, 1999 WL 79569, at \*1 n.2 (E.D.Pa. Jan. 15, 1999). Harmon did not object to the Magistrate's Report on this issue.

#### VI. Sufficiency of the Evidence

Evidence is insufficient "if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 309, 324 (1979); see also Evans v. Court of Common Pleas, Delaware County, 959 F.2d 1227, 1233 (3d Cir. 1992) (The test for sufficiency in Pennsylvania is the same as in the federal courts.). It is necessary to "look to the evidence the

state considers adequate to meet the elements of a crime governed by state law." Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir. 1997).

The trial court properly enunciated the elements of Pennsylvania law and applied the law to the relevant evidence.<sup>4</sup> All of the elements of aggravated assault were established. The trial court applied Jackson reasonably. The finding of sufficient evidence was not contrary to or an unreasonable application of U.S. Supreme Court precedent; it was also not based on an unreasonable determination of fact.

#### **CONCLUSION**

Harmon's habeas corpus claims are either non-cognizable or meritless and provide no basis for relief. The state court correctly applied Batson and Jackson. Petitioner's claim that the trial court decision was against the weight of the evidence is not cognizable. The petitioner also failed to provide clear and convincing evidence to rebut the presumption of correctness due state court factual findings. The amended petition for a writ of habeas corpus will be denied.

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<sup>4</sup>The trial court properly followed the statutory standards for aggravated assault in 18 Pa. Cons. Stat. § 2702(a)(1). The court also applied the definition of "serious bodily injury" in 18 Pa. Cons. Stat. § 2301, and the definition of criminal attempt in 18 Pa. Cons. Stat. § 901(a).



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ORDER

AND NOW this 22<sup>nd</sup> day of June, 2000, after careful and independent consideration of the amended petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, after review of the Report and Recommendation of Magistrate Judge Scuderi, and petitioner's Objection to Magistrate Recommendation, and in accordance with the attached memorandum,

it is **ORDERED** that:

1. The petition filed pursuant to 28 U.S.C. § 2254 is **DENIED**.
2. The Report and Recommendation of Magistrate Judge Scuderi is **APPROVED** and **ADOPTED**.
3. Petitioner's Objection to Magistrate Recommendation is **OVERRULED**.
4. There is no basis for the issuance of a certificate of appealability.

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Norma L. Shapiro, S.J.